Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

A.R. and L.R.,

Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition For A Writ Of Certiorari From An Order Of The Supreme Judicial Court Of The Commonwealth Of Massachusetts

THE PETITIONERS A.R.'S AND L.R.'S PETITION FOR A WRIT OF CERTIORARI

The Petitioner A.R.,
By His Attorney,

ROBERT J. CARNES, ESQ.
Designated Counsel of Record
57 Wendell Avenue
Pittsfield, MA 01201
(413)-443-1010
B.B.O.#074640

The Petitioner L.R.,
By His Attorney,

PAUL W. CORMIER, ESQ.
8 Bank Row
Pittsfield, MA 01201
(413)-499-5822
B.B.O.#100120

July, 1998

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I. Whether the Superior Court Judge properly denied the Commonwealth's Petition for Order Compelling Witnesses to Submit to Blood Sample where the record as presented by the Commonwealth failed to establish probable cause to believe that the evidence sought from these Petitioners would aid in the furtherance of the Grand Jury's investigation?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The Petitioners L.R. and A.R. respectfully petition for a Writ of Certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts in this case.

OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts *In the Matter of a Grand Jury Investigation* (App. 21-31) is reported at 427 Mass. 221; 692 N.E.2d 56 (1998).

JURISDICTION

Because this Petition involves the interpretation of Federal Constitutional law by the highest court of the Commonwealth of Massachusetts, this Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution made applicable to the States by the Fourteenth Amendment of the Constitution states that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon

probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

STATEMENT OF THE CASE

A. FACTS

By Its Petition filed in the Berkshire Superior Court in Pittsfield, MA, the Commonwealth seeks to compel the Petitioners L.R. and A.R. to furnish their blood for paternity blood-type testing as part of an on-going investigation by the Berkshire Grand Jury into the alleged rape of the Victim[1], L.R.'s daughter and A.R.'s sister. (A.1-2)[2] The Petitioners L.R. and A.R. have objected to the drawing of their blood and have maintained throughout these proceedings that to permit the drawing of their blood over their objection based on the record presented below would violate their constitutional rights as guaranteed to them under the Fourth and Fourteenth Amendments of the United States Constitution. (A.5-13).

As represented in the Commonwealth's Petition, the Victim became pregnant during the summer of 1996. Described in the Commonwealth's Petition as being "profoundly retarded," the Commonwealth alleged that the

---

[1] The Supreme Judicial Court in the proceedings below, had impounded the matter.

This Petition will designate the father as L.R., the brother as A.R. and the sister as the Victim to maintain the secrecy of the identity of the persons involved.

[2] References to the Record Appendix will appear as (A.___).

Victim was not capable of communicating with the investigators in this case. (A.2)

During the course of the investigation conducted by the Berkshire District Attorney's Office, a trooper of the Massachusetts State Police interviewed A.R.'s mother who gave an explanation as to how the Victim may have become pregnant:

> "She and her husband engage in sexual intercourse about once weekly after which she wipes herself with a towel; during the night (the Victim's) diaper is changed and she is cleaned with a towel, and that maybe semen was transferred to (the Victim) by a towel used to wipe (Mrs.L.R.)." (A.1-2).

From a medical examination of the aborted fetus, it was assumed by the Commonwealth that the date of conception occurred on either July 29 or 30, 1996. (A.3). By vote of the members of the Grand Jury, the Commonwealth sought by way of Its Petition a court order compelling the Petitioners to submit to the testing of their blood. However, nowhere in the Commonwealth's unsworn Petition before the Superior Court Judge was there any representation as to who, if anyone, had access to the Victim on or about the time of the suspected date of conception.[3] (A.1-5)

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[3] The Commonwealth suggested that because all of the Victim's agency workers were female, that the Petitioners "were the only males with access to the Victim during the critical period in late July, 1996 when she became pregnant." (A.3)

In his written findings, the Superior Court Judge concluded that "the Commonwealth has failed to establish that there is probable cause that either (Petitioner) committed the offense." (A.19) The Superior Court Judge also concluded that he was not persuaded that the "Grand Jury is entitled to the production of 'mere evidence' which would not otherwise be available to the Commonwealth through normal investigative procedures or through application to the Court for a search warrant." (A.19) He thus denied the Commonwealth's request for the Petitioners' blood samples. The Commonwealth appealed the Superior Court Judge's order to the Supreme Judicial Court. A Single Justice of that Court affirmed the Superior Court Judge's decision but a further appeal by the Commonwealth resulted in the full Supreme Judicial Court reversing the order of the Superior Court Judge and requiring the Petitioners to submit to blood testing in furtherance of the grand jury investigation.

B. PROCEEDINGS BELOW

The Commonwealth through the Berkshire District Attorney's Office, filed a Petition in the Berkshire Superior Court on March 7, 1997, seeking an order to compel the Petitioners L.R. and A.R. to produce samples of their blood for analysis. Both Petitioners objected to the Motion and argued against the motion in a hearing before a Superior Court Judge (Carhart, J.) On March 11, 1997, the Superior Court Judge denied the Commonwealth's petition on March 14, 1997. A Motion by the Commonwealth to Reconsider his decision in this matter was

denied on April 8, 1997. The Commonwealth filed a Petition pursuant to Massachusetts General Laws Chapter 211, section 3, challenging the Superior Court Judge's decision. On May 2, 1997, the Single Justice of the Supreme Judicial Court (O'Connor, J.) denied the Commonwealth's Petition for Relief and the Commonwealth subsequently appealed the Single Justice's decision to the full bench of the Supreme Judicial Court. (S A.5). On April 10, 1998, the full bench of the Supreme Judicial Court reversed the Single Justice's order in Its decision of *In the Matter of a Grand Jury Investigation*, 427 Mass. 221, 692 N.E.2d 56 (1998) and remanded the case back to the Superior Court for the taking of blood samples. The Petitioners obtained a stay of the issuance of the rescript opinion by the Supreme Judicial Court while pursuing a Writ of Certiorari with this Court.

REASONS FOR GRANTING THE WRIT

I. THE SUPERIOR COURT JUDGE PROPERLY DENIED THE COMMONWEALTH'S PETITION FOR BLOOD SAMPLES OF WITNESSES AS ITS PETITION FAILED TO ESTABLISH PROBABLE CAUSE TO BELIEVE THAT THE PETITIONERS L.R.'S OR A.R.'S BLOOD IS RELEVANT TO THE COMMONWEALTH'S INVESTIGATION OR THAT THE PETITIONERS L.R. OR A.R. COMMITTED THE CRIME UNDER INVESTIGATION.

"The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). The Fourth Amendment protects

the "expectations of privacy . . . the individual's legitimate expectations that in certain places and certain times he has the right to be let alone – the most comprehensive of rights and the right most valued by civilized man." *Winston v. Lee*, 470 U.S. 753, 758 (1985) (citations omitted). Moreover, the Fourth Amendment "guarantees the privacy, dignity and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 613-4 (1989).

Of course, an order compelling a person to give a blood sample is a search for the purposes of invoking constitutional protection. *Schmerber v. California*, 384 U.S. 757, 767 (1966). The protection of the Fourth Amendment of the United States Constitution exists not only to redress past intrusions through application of the exclusionary rule but also, as is the case here, to prevent threatened intrusions at the investigatory stage. *Davis v. Mississippi*, 394 U.S. 721, 729 (1969).

Heretofore, this Court has held that any search for evidence involving bodily fluids or items concealed within the body, must be based on probable cause to believe the sample will provide material and relevant evidence in furtherance of the Commonwealth's investigation. *Schmerber*, at 767. *Winston*, at 759. Put another way, "a search for evidence to prove the commission of crime (is not barred) provided there is probable cause for the belief that the evidence sought will aid in the particular (suspect's) apprehension or conviction." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 306-7 (1967).

The Commonwealth has advocated in Its request for blood samples that mere reasonable suspicion will suffice in supporting the grand jury's request. The two standards are different:

> "Articulating precisely what 'reasonable suspicion' and probable cause means is not possible. They are common sense, non-technical (concepts) that deal in the factual and practical considerations of every day life in which reasonable and prudent men, not legal technicians act . . . As such, the standards are not readily, or even usefully, reduced to a neat set of legal rules. We have described reasonable suspicion simply as a particularized and objective basis for suspecting the person stopped of criminal activity . . . and probable cause to search. . . . where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

To what extent a privacy interest is recognized as being protected under the Fourth Amendment depends upon a number of factors. As this Court recognized in *Skinner, supra*:

> " . . . the Fourth Amendment does not (prohibit) all searches and seizures, but only those that are unreasonable . . . What is reasonable, of course, depends on all of the circumstances surrounding the search and seizure itself. . . . Thus, the permissibility of a particular practice is guided by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests." *Skinner*, at 619.

As to blood samples, the Petitioners submit, there is a greater expectation of privacy. When a blood sample is sought, this Court is "not dealing . . . with fingerprinting or other routine and relatively mild intrusions of a person's bodily integrity which are normally done pursuant to an arrest." *United States v. Allen*, 337 F.Supp. 1041, 1043 (E.D.Pa. 1972). In the case of blood samples, "it is obvious that this physical intrusion, penetrating under the skin, infringes upon an expectation of privacy that society is prepared to recognized as reasonable." *Skinner* at 616. As such,

> "(T)he Fourth Amendment's (requirement) that searches be 'reasonable' requires that when the (Government) seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make a search reasonable." *Winston v. Lee*, 470 U.S. 753, 767 (1985).

In this case, the privacy interests of the Petitioners are in conflict with the claimed governmental needs of its grand jury investigation. At issue is whether the constitutional protection that the Fourth Amendment provides to the Petitioners or the law enforcement interests of the Commonwealth must give way.

As in any case where the propriety of a search is challenged, the validity of any search is "judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate government interests. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Simply because the matter is presently being investigated by a grand jury should not compel application of a lesser standard of evidence.

Of course, a grand jury is charged with grave responsibilities. "Without a through and effective investigation, the grand jury would be unable to either ferret out crimes deserving prosecution, or to screen out charges not warranting prosecution." *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983). As this Court has recognized, however, "(t)he investigatory powers of the grand jury are nevertheless not unlimited". *United States v. R. Enterprises, Inc*, 498 U.S. 292, 299 (1991). Specifically, as it applies to this case the Petitioners submit, the grand jury's power to compel a blood sample "is limited; it may not invade a valid privilege established by the Constitution, statute, or the common law". *United States v. Calandra*, 414 U.S. 338, 346 (1974).

Other cases decided by this Court regarding the propriety of requests by a grand jury simply do not apply. For example, a suspect being compelled to provide voice samples involves minimal privacy interests. This is so because "an individual has no expectation of privacy with respect to that which he knowingly exposes to the public at large." *United States v. Dioniso*, 410 U.S. 1, 14 (1973): ("no person has a reasonably expectation that others will not know the sound of his voice any more than he can reasonably expect that his face will be a mystery to the world").

Because here, there is a greater expectation of privacy, probable cause and not "reasonable cause" (as the Supreme Judicial Court has apparently decided in Its decision below) is the proper standard to be employed in this case. While "(a) search unsupported by probable cause, can be constitutional. . . . when special needs, beyond the normal needs of law enforcement, make the

warrant and probable cause requirements impracticable." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995), here, the only "special need" asserted by the Commonwealth is the need to circumvent the probable cause requirement of the Fourth Amendment. There are no exigent circumstances (compare *Schmerber, supra*), no significant public safety issues indicated (compare *Delaware v. Prouse, supra*). Rather, the Commonwealth's investigation has simply not reached the stage where a probable cause showing can be made to justify the order.

The Petitioners L.R. and A.R. maintain the Commonwealth's need for obtaining the evidence when It cannot even establish probable cause to believe that it would aid in the furtherance of the investigation, weighed against the important constitutional rights that protect them from unreasonable search and seizures must cause this Court to conclude that the Superior Court Judge correctly denied the Commonwealth's request for their blood sample. Therefore, they respectfully ask this Court to grant their petition for Writ of Certiorari on this important issue.

II. THE DECISION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS IS ERRONEOUS.

For the reasons stated above, the Petitioners respectfully submit that the Supreme Judicial Court's decision declaring the request of the grand jury to be reasonable is erroneous. It is assumed (but not stated with sufficient specificity) that the Supreme Judicial Court has declared that reasonable suspicion, and not probable cause is the

applicable standard. Ignoring the recognizable privacy interests of the Petitioners in this case, the Supreme Judicial Court has erred in failing to require a showing of probable cause in support of the grand jury's request. "(B)ecause the search and seizure involved 'intrusions beyond the body surface' and 'the interest in human dignity and privacy' which the Fourth Amendment protects forbids such intrusions on the *mere chance* that the desired evidence may be obtained.' *Schmerber, supra* at 769-70. The Petitioners L.R. and A.R. respectfully maintain the standards of reasonable suspicion employed by the Supreme Judicial Court offend this fundamental Constitutional protection. The distinction is especially important here, where the Commonwealth has repeatedly conceded that the level of evidence presented to the grand jury would not satisfy a probable cause standard.

Moreover, nowhere in the Commonwealth's Petition, and nowhere on the Superior Court Judge's decision, is there a determination as to who had access to the Victim on or about the suspected date of conception. Thus, the Commonwealth has not even establish reasonable suspicion, much less probable cause.

III. THE QUESTION PRESENTED IS IMPORTANT

Aside from the issues stated above, the Petitioners assert that this issue "is of considerable importance to the administration of justice." *Calandra,* at 339. While this Court has frequently spoken of both the constitutional protection of the Fourth Amendment and the constitutional limitations of the grand jury, this Court has yet to consider the two issues in direct opposition with each

other. Scientific interpretation and analysis of physical evidence and bodily fluids has advanced considerably since the decision in *Schmerber* some thirty years ago. Addressing the issue raised in this Petition, the Petitioners submit, will better clarify the scope and limits of both the Fourth Amendment and the operations of the grand jury in modern times.

CONCLUSION

The Petitioners L.R. and A.R. respectfully ask that their petition for a Writ of Certiorari be granted.

Respectfully submitted,

The Petitioner A.R.,
By His Attorney,

ROBERT J. CARNES, ESQ.
Designated Counsel of Record
57 Wendell Avenue
Pittsfield, Mass. 01201
(413)-443-1010
B.B.O.#074640

Respectfully submitted,

The Petitioner L.R.,
By His Attorney,

PAUL W. CORMIER, ESQ.
8 Bank Row
Pittsfield, Mass. 01201
(413)-499-5822
B.B.O.#100120

Date submitted: July 9, 1998

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COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS. TRIAL COURT OF THE COMMONWEALTH SUPERIOR COURT DEPARTMENT

IN RE: GRAND JURY INVESTIGATION INTO THE RAPE OF (THE VICTIM)[1]

COMMONWEALTH'S PETITION FOR ORDER COMPELLING WITNESSES TO SUBMIT BLOOD SAMPLES

Now comes the Commonwealth in the above matter and, on behalf of the Berkshire County Grand Jury sitting for the January, February and March 1997 term, petitions this Honorable Court for an Order directing certain witnesses, to wit: (L.R. and A.R.), to submit to taking of samples of their blood, to be performed by trained laboratory personnel under the direction of the Massachusetts State Police. The Commonwealth further moves that if such witnesses shall refuse to submit to such an Order, that they be directed to show cause why they should not be found in contempt of the Court.

As reasons therefor, the Commonwealth states as follows:

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[1] Regarding the Petition for Certiorari, this matter will not be impounded. The names used in the Commonwealth's Petition to the Superior Court, the Petitioners' responses to the Superior Court, and the order of the Berkshire Superior Court are herein changed from their original version to L.R. (father), D.R. (mother), A.R. (brother), and Victim (sister/daughter).

1. The Grand Jury is currently investigating the circumstances surrounding the pregnancy, and apparent rape, of twenty-one-year-old (Victim), occurring on or about July 30, 1996.

2. Pursuant to that investigation, Massachusetts State Police Trooper Jean Thibodeau, an investigator assigned to the Crime Prevention and Control unit attached to the Berkshire District Attorney's Office, testified before the Grand Jury on February 26, 1997.

3. Trooper Thibodeau informed the Grand Jury that (the Victim) is a twenty-one-year-old profoundly retarded, autistic woman who lives at home with her parents, (L.R. and D.R.) and her brother (A.R.). Due to her limitations, (the Victim) speaks at a level of less than a two-year-old and requires twenty-four-hour supervision. In addition to her family, (the Victim) is supervised by representatives of BFAIR, a social-serice [sic] agency under the auspices of the state Department of Mental Retardation [DMR] and attends special education classes at Pittsfield High School. During the summer of 1996, (the Victim) did not attend school and the only BFAIR workers assigned to her were female.

4. On November 25, 1996 an examination performed by Dr. Fred Levinson, (the Victim's) gynecologist, determined that she was approximately eighteen weeks pregnant. A representative of DMR notified the State Police and an investigation was undertaken.

5. Based upon her interviews of (D.R.) and DMR and BFAIR workers, Trooper Thibodeau informed the Grand Jury that, due to her limitations, (the Victim) is

incapable of understanding the concept of sex or of giving her consent to sexual intercourse.

6. Trooper Thibodeau interviewed (D.R.) on December 3, 1996. (D.R.) explained how (the Victim's) may have become pregnant; she and her husband engage in sexual intercourse about once weekly, after which she wipes herself with a towel; during the night, (the Victim's) diaper is changed and she is cleaned with a towel, and that maybe semen was transferred to (the Victim) by a towel used to wipe (D.R.). In speaking with a worker from Women's Services two weeks later, (D.R.) repeated this explanation. During her interview with Trooper Thibodeau, (D.R.) asserted that the family was committed to determining how (the Victim) became pregnant, and told Trooper Thibodeau that her husband and son would willingly provide blood samples to begin the process of excluding possible perpetrators.

7. Pursuant to an Order of the Probate Court, (the Victim's) pregnancy was terminated on December 17, 1996, and that, upon examination of the fetus at that time, the attending physician estimated the date of conception at July 29 or 30, 1996. Samples of (the Victim's) blood and of the fetal tissue were specially packaged and mailed to LabCorp, a North Carolina corporation which specializes in forensic paternity analysis.

8. Trooper Thibodeau further informed the Grand Jury that, if LabCorp were to receive blood samples of (L.R. and A.R.), they would be able to perform comparison tests, along with the blood and fetal tissue samples already received, to determine if either (L.R. or A.R.) had impregnated (the Victim), to a certainty greater than 99%.

9. Trooper Thibodeau also informed the Grand Jury that, based upon (D.R.'s) pledge of her family's cooperation, Trooper Thibodeau had arranged for a LabCorp representative to take blood samples from (L.R. and A.R.) on January 21, 1997, when LabCorp was in Pittsfield for a regularly-scheduled appointment with the state Department of Revenue. However, in January (D.R.) informed Trooper Thibodeau that the family had retained an attorney and that all communications were to be through the attorney.

10. Trooper Thibodeau further informed the Grand Jury that, according to her information, (L.R. and A.R.) were individually represented by attorneys and that each attorney, when contacted by the District Attorney's Office, represented that his client would not voluntarily submit a sample of his blood for comparison analysis purposes.

11. Following the testimony of Trooper Thibodeau, the Grand Jury voted to petition this Court for an Order, requiring (L.R. and A.R.) to submit samples of their blood for comparison testing by LabCorp, to determine whether either is responsible for the impregnation of (the Victim).

12. A representative of LabCorp will be in Pittsfield for a regularly-scheduled appointment with the state Department of Revenue at the Probate Court building on Tuesday, March 18, 1997.

Wherefore, the Commonwealth, on behalf of the Grand Jury, petitions this Court to order (L.R. and A.R.) to submit to the taking of a sample of their blood by a representative of LabCorp, under the direct of the

Massachusetts State Police, on Tuesday, March 18, 1997 at the Probate Court building in Pittsfield.

Respectfully Submitted
On behalf of The
Berkshire County
Grand Jury,

GERARD D. DOWNING
DISTRICT ATTORNEY

by: /s/ David F. Capeless, Esq.
David F. Capeless, Esq.
First Assistant District
Attorney
42 West Street
P.O. Box 1969
Pittsfield, MA 01202
(413) 443-5951

Dated: March 7, 1997

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. TRIAL COURT OF THE COMMONWEALTH SUPERIOR COURT DEPARTMENT

IN RE: GRAND JURY INVESTIGATION IN THE MATTER OF (THE VICTIM)

OBJECTION OF (L.R.) TO THE COMMONWEALTH'S PETITION FOR ORDER COMPELLING WITNESSES TO SUBMIT BLOOD SAMPLES

Now comes (L.R.), by his attorney, and objects to the Commonwealth's petition for order compelling witnesses to submit blood samples. For reasons in support, the respondent refers to the memorandum submitted herewith.

Respectfully submitted,
(L.R.), by:

Paul W. Cormier, Esq.
8 Bank Row
Pittsfield, Ma 01201
413-499-5822
BBO # 100120

March 12, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day hand delivered to Assistant District Attorney David F. Capeless who maintains offices at 42 West Street, Pittsfield, Ma 01201.

_____

Paul W. Cormier, Esq.

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. TRIAL COURT OF THE COMMONWEALTH SUPERIOR COURT DEPARTMENT

IN RE: GRAND JURY INVESTIGATION IN THE MATTER OF (THE VICTIM)

MEMORANDUM OF (L.R.) IN SUPPORT OF HIS OBJECTION TO THE COMMONWEALTH'S PETITION FOR ORDER COMPELLING WITNESSES TO SUBMIT BLOOD SAMPLES

LAW

An order compelling the production of a blood sample is an intrusion that implicates protections provided by the Fourth and Fourteenth Amendments to the United States Constitution. Schmerber v. California, 384 U.S. 757, 767 (1966). Commonwealth v. Trigones, 397 Mass. 633, 640 (1986). In reaching this conclusion the Schmerber Court made clear that a government order compelling a person to produce corporeal evidence involves potential violations of the Fourth Amendment to the United States Constitution at two different levels: "the 'seizure' of the 'person' necessary to bring him into contact with government agents . . . and the subsequent search for and seizure of the evidence." United States v. Dionisio, 410 U.S. 1, 8 (1973). The protections of common law and of Article 14 of the Massachusetts Declaration of Rights are also implicated.

Seizure of a blood sample pursuant to a warrant or Court order before arrest or indictment is reasonable in circumstances where there is probable cause to believe that the person whose blood is sought committed the crime, and where that person has been afforded a hearing at which a judge makes findings as to the degree of intrusion and the need for the evidence of the blood sample. The Matter of Lavigne, 418 Mass. 831, 835-836 (1994).

Unless it appears from the record that the Commonwealth has probable cause to arrest or to indict, the Commonwealth does not have probable cause to believe that the respondent committed the crime alleged; the probable cause necessary for the issuance of a warrant or Court order would subsume probable cause to arrest or to indict. The Matter of Lavigne, 418 Mass. 831, 838 (1994) (Liacos dissent).

The record should establish probable cause to believe believe [sic] that the extracted blood would inculpate the respondent, which would be a permissible justification for a warrant or Court order. If the Commonwealth at best can only establish probable cause to believe that the respondent's blood will either inculpate him, exculpate him, or neither, the Commonwealth will have failed to show that there is probable cause to believe that the extraction and testing of respondent's blood will produce evidence to prove his or anyone's guilt of a crime. The Matter of Lavigne, 418 Mass. 831, 839-840 (1994) (O'Connor dissent).

It was held in Commonwealth v. Murray, 359 Mass. 541, 547 (1971), from which the Lavigne court quotes, ante at 835, that "a search for evidence to prove the commission

of a crime [is not barred] provided there is probable cause for the belief that the evidence sought will aid in a particular apprehension or conviction." It should also be noted that blood evidence sought relative to a rape investigation, absent other evidence of intercourse, will not aid in a particular apprehension or conviction, since the test results obtained will not be evidence of intercourse. Commonwealth v. Beausoliel, 397 Mass 206, 220 n.18 (1984).

ARGUMENT

The respondent respectfully submits that the record does not establish probable cause to believe that the respondent committed the crime alleged, or that test results would inculpate the respondent. Additionally, test results that would exculpate would not further the Commonwealth's investigation, as the results would not aid in a particular apprehension or conviction.

Also, there is no affidavit or other support of the Commonwealth's petition. The petition does not demonstrate the identity or basis of knowledge of numerous persons providing information to Trooper Thibodeau, upon which the Trooper relies in making factual assertions. The petition does not demonstrate the reliability of such information. Also, the respondent challenges the factual assertions and/or implications therein, as follows:

1. There is insufficient reliable evidence to establish probable cause that (the Victim) is incapable of understanding the concept of sex or of giving her consent to sexual intercourse, or that consent was not given.

2. There is insufficient reliable evidence to establish probable cause that (the Victim) became pregnant as the result of sexual intercourse.

3. There is insufficient reliable and accurate evidence to establish probable cause that the date of conception is as stated.

4. There is insufficient reliable and accurate evidence to establish probable cause to preclude others from paternity, whether with regard to access and opportunity or scientific exclusion.

5. There is insufficient reliable evidence to establish probable cause that the result of testing the respondent's blood would establish paternity.

Respectfully submitted,
(L.R.), by:

_____

Paul W. Cormier, Esq.
8 Bank Row
Pittsfield, Ma 01201
413-499-5822
BBO # 100120

March 12, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day hand delivered to Assistant District Attorney David F. Capeless who maintains offices at 42 West Street, Pittsfield, Ma 01201.

_____

Paul W. Cormier, Esq.

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, S.S.	SUPERIOR COURT No.
IN RE: GRAND JURY INVESTIGATION INTO THE RAPE OF (THE VICTIM)	(A.R.'s) OPPOSITION TO COMMONWEALTH'S PETITION FOR ORDER COMPELLING WITNESSES TO SUBMIT BLOOD SAMPLES

Now comes (A.R.), through his attorney Robert J. Carnes, and hereby opposes the Commonwealth's Petition for Order Compelling Witnesses to Submit Blood Samples in the above-entitled matter.

For reasons in support of his Opposition, a Memorandum of Law is filed herewith.

(A.R.),
By His Attorney,

ROBERT J. CARNES, ESQ.
54 Wendell Avenue
Pittsfield, Mass. 01201
(413)-443-1010
B.B.O. #074640

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, S.S.	**SUPERIOR COURT**
IN RE: GRAND JURY INVESTIGATION	**No.**
INTO THE RAPE OF (THE VICTIM)	**MEMORANDUM OF LAW IN SUPPORT OF (A.R.'s) OPPOSITION TO COMMONWEALTH'S PETITION FOR ORDER COMPELLING WITNESSES TO SUBMIT BLOOD SAMPLES**

FACTS

According to the Commonwealth's Petition, a Berkshire Grand Jury is presently considering an investigation into an alleged rape of (the Victim) occurring on or about July 30, 1996. (The Victim) is the biological sister of (A.R.).

As represented in the Commonwealth's Petition, (the Victim) became pregnant during the summer of 1996. Described in the Commonwealth's Petition as being "profoundly retarded," the Commonwealth alleged that (the Victim) is not capable of communicating with the investigators in this case.

As further indicated in the Commonwealth's Petition, a trooper of the Massachusetts State Police interviewed (A.R.'s) mother who gave an explanation as to how (the Victim) may have become pregnant:

> "She and her husband engage in sexual intercourse about once weekly, after which she wipes herself with a towel during the night. (The Victim's) diaper is changed and she is cleaned with

> a towel and maybe semen was transferred to (the Victim) by a towel used to wipe (D.R.)."

According to a medical examination of the aborted fetus, it is assumed that the date of conception occurred on either July 29 or 30, 1996. Despite this, at no point in the Commonwealth's unsworn Petition is there any representation as to who, if anyone, had access to (the Victim) on or about the time of the suspected date of conception. Most importantly, the Petition is absolutely devoid of any suggestion that (A.R.) is some how responsible for his sister's pregnancy.

ARGUMENT

THE COMMONWEALTH'S PETITION FAILS TO ESTABLISH PROBABLE CAUSE TO BELIEVE THAT (A.R.'S) BLOOD IS RELEVANT TO THE COMMONWEALTH'S INVESTIGATION OR THAT (A.R.) COMMITTED THE CRIME UNDER INVESTIGATION.

Under both the United States Constitution and the Massachusetts Declaration of Rights, all citizens enjoy the right of privacy and security against arbitrary and unreasonable searches and invasions by governmental officials. *Horton v. California,* 496 U.S. 128, 131 (1990); *Commonwealth v. Upton,* 394 Mass. 363, 374-5 (1985). An order compelling a person to give a blood sample is a search for the purposes of invoking constitutional protections. *Commonwealth v. Trigones,* 397 Mass. 633, 639 (1986); *Schmerber v. California,* 384 U.S. 757, 767 (1966). Thus, as is the case of any other search done without an individual's consent, a court-authorized search must be based on probable

cause "for believing that the person whose blood the Commonwealth seeks has committed the crime." *In the Matter of Lavigne,* 418 Mass. 831, 835 (1994). Any search for evidence, particularly one involving bodily fluids, must be based on probable cause to believe the sample will provide material and relevant evidence in furtherance of the Commonwealth's investigation. *Schmerber,* at 767; *Trigones,* at 640-41. Put another way, "a search for evidence to prove the commission of crime (is not barred) provided there is probable cause for the belief that the evidence sought will aid in the particular apprehension or conviction." *Commonwealth v. Murray,* 359 Mass. 541, 547 (1971) citing *Warden, Md. Penitentiary v. Hayden,* 387 U.S. 294, 307 (1967) at 306-07 (1967).

The Commonwealth's Petition utterly fails to present any evidence or even a suggestion that (A.R.) is somehow responsible for his sister's pregnancy. To the contrary, the evidence presented in the Commonwealth's Petition establishes, at best, that someone other than (A.R.) was the source of the semen which impregnated (the Victim). The facts presented in the Commonwealth's Petition "can only establish . . . that a sample of (A.R.'s) blood with either implicate him, exculpate him, or neither . . . (thus the Petition) "has failed to show that there is probable cause to believe that the extraction and testing of (A.R.'s) blood will produce evidence to prove anyone's guilt of a crime." *Lavigne, supra,* at 840 (O'Connor dissent).

As in any case where the propriety of a search is challenged, this Court must "weigh the seriousness of the crime, the importance of the evidence to the investigation, and the unavailability of less intrusive means of

obtaining it on the one hand against concerns for the suspect's constitutional right to be free from bodily intrusion on the other." *Matter of an Investigation into the Death of Abe A.*, 56 N.Y. 2nd, 288, 291 (1982). For reasons already stated, the Commonwealth's need for obtaining the evidence when it cannot even establish probable cause to believe that it would aid in the furtherance of the investigation[1], when weighed with the important constitutional rights (A.R.) has to be free from unreasonable search and seizures must cause this Court to deny the Commonwealth's Petition.

CONCLUSION

To permit the drawing of (A.R.'s) blood over his objection based on a showing presently made by the Commonwealth would, it is respectfully submitted, violates his constitutional rights as guaranteed him under the Fourth and Fourteenth Amendments of the United States Constitution and Article XIV of the Massachusetts Declaration of Rights. He, therefore, respectfully objects

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[1] Aside from the constitutional issues raised in this Memorandum, it is suggested that there is a real issue based on the status of the investigation to date as to whether the results of the blood testing, if obtained by the Commonwealth, would be admissible in any rape prosecution. ("(I)t should be clear that HLA test results are not evidence of intercourse. Consequently, absent a determination by the judge that there is other evidence which would warrant a jury's finding of intercourse during the period of probable conception, such HLA tests should be excluded." *Commonwealth v. Beausoliel*, 397 Mass. 206, 220, n.18 (1984)).

to the Petition filed by the Commonwealth in this matter and asks this Honorable Court to deny it.

Respectfully submitted,
(A.R.),
By His Attorney,

ROBERT J. CARNES, ESQ.
54 Wendell Avenue
Pittsfield, Mass. 01201
(413)-443-1010
B.B.O. #074640

RJC/chr
MOTBLOOD.MEM

IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. SUPERIOR COURT
CRIM ACTION
NO.

IN RE: GRAND JURY INVESTIGATION INTO THE RAPE OF (THE VICTIM)

March 14, 1997

FINDINGS AND RULINGS

The Commonwealth, in behalf of the Grand Jury of Berkshire County, has petitioned the Court for an order compelling (L.R.) and (A.R.) to submit to the taking of samples of their blood. After hearing, the petition is **DENIED**.

BACKGROUND

The Commonwealth, by way of petition in behalf of the Grand Jury of Berkshire County has petitioned for an order compelling (L.R.) and (A.R.) to submit to the taking of samples of their blood. In its petition the Commonwealth alleged as follows:

> "1. The Grand Jury is currently investigating the circumstances surrounding the pregnancy, and apparent rape, of twenty-one year old Victim, occurring on or about July 30, 1996.
>
> 2. Pursuant to that investigation, Massachusetts State Police Trooper Jean Thibodeau, an investigator assigned to the Crime Prevention

and Control unit attached to the Berkshire District Attorney's Office, testified before the Grand Jury on February 26, 1997.

3. Trooper Thibodeau informed the Grand Jury that (the Victim) is a twenty-one year old profoundly retarded, autistic woman who lives at home with her parents, (L.R. and D.R.), and her brother, seventeen year old (A.R.). Due to her limitations, (the Victim) speaks at a level of less than a two-year old and requires twenty-four hour supervision. In addition to her family, (the Victim) is supervised by representatives of BFAIR, a social-service agency under the auspices of the state Department of Mental Retardation (DMR) and attends special education classes at Pittsfield High School. During the Summer of 1996, (the Victim) did not attend school and the only BFAIR workers assigned to her were female.

4. On November 25, 1996 an examination performed by Dr. Fred Levinson, (the Victim's) gynecologist, determined that she was approximately eighteen weeks pregnant. A representative of DMR notified the State Police and an investigation was undertaken.

5. Based upon her interviews of (D.R.) and DMR and BFAIR workers, Trooper Thibodeau informed the Grand Jury that, due to her limitations, (the Victim) is incapable of understanding the concept of sex, or of giving her consent to sexual intercourse.

6. Troper [sic] Thibodeau interviewed (D.R.) on December 3, 1996. (D.R.) explained how (the Victim) may have become pregnant: she and her husband engage in sexual intercourse about once weekly, after which she wipes

herself with a towel; during the night, (the Victim's) diaper is changed and she is cleaned with a towel, and that maybe semen was transferred to (the Victim) by a towel used to wipe (D.R.). In speaking with a worker from Women's Services two weeks later, (D.R.) repeated this explanation. During her interview with Trooper Thibodeau, (D.R.) asserted that her family was committed to determining how (the Victim) became pregnant, and told Trooper Thibodeau that her husband and son would willingly provide blood samples to begin the process of excluding possible perpetrators.

7. Pursuant to an Order of the Probate Court, (the Victim's) pregnancy was terminated on December 17, 1996, and that, upon examination of the fetus at that time, the attending physician estimated the date of conception at July 29 or 30, 1996. Samples of (the Victim's) blood and of the fetal tissue were specially packaged and mailed to Lab Corp, a North Carolina corporation which specializes in forensic paternity analysis.

8. Trooper Thibodeau further informed the Grand Jury that, if Lab Corp were to receive blood samples of (L.R. and A.R.), they would be able to perform comparison tests, along with the blood and fetal tissue samples already received, to determine if either (L.R. or A.R.) had impregnated (the Victim), to a certainty greater than 99%.

9. Trooper Thibodeau also informed the Grand Jury that, based upon (D.R.'s) pledge of her family's cooperation, Trooper Thibodeau had arranged for a Lab Corp representative to take blood samples from (L.R. and A.R.) on January 21, 1997, when Lab Corp was in Pittsfield for a

regularly scheduled appointment with the state Department of Revenue. However, in January (D.R.) informed Trooper Thibodeau that the family had retained an attorney and that all communications were to be through the attorney.

10. Trooper Thibodeau further informed the Grand Jury that, according to her information, (L.R. and A.R.) were individually represented by attorneys and that each attorney, when contacted by the District Attorney's Office, represented that his client would not voluntarily submit a sample of his blood for comparison analysis purposes.

11. Following the testimony of Trooper Thibodeau, the Grand Jury voted to petition this Court for an Order, requiring (L.R. and A.R.) to submit samples of their blood for comparison testing by Lab Corp, to determine whether either is responsible for the impregnation of (the Victim).

12. A representative of Lab Corp will be in Pittsfield for a regularly scheduled appointment with the state Department of Revenue at the Probate Court building on Tuesday, March 18, 1997."

At oral argument on the hearing on its petition, the Commonwealth argued that the facts presented in its petition were sufficient to satisfy the requirements for a Court Order directing that (L.R. and A.R.) submit to the taking of their blood samples. Counsel for (L.R. and A.R.), while not disputing the allegations in the Commonwealth's petition, argued that the standards required for the issuance of the proposed Court Order were not met.

DISCUSSION

Both the Commonwealth and counsel for (L.R. and A.R.) concede that the taking of blood samples is considered a search for purposes of the Fourth Amendment to the United States Constitution. Counsel for (L.R. and A.R.) contend that the Commonwealth, even though acting at the request of the Grand Jury, must establish that there is probable cause to believe that the person whose blood is sought has committed the crime. The Commonwealth contends that it should not be held to the standard of probable cause but rather, since this is a request by a Court-supervised investigatory body, the standard ought to be reasonable cause. The Commonwealth argues that to require the standard of probable cause in such circumstances would undermine the investigatory function of the Grand Jury, since a finding of probable cause is sufficient for the return of an indictment.

An order compelling a person to give blood is a search for constitutional purposes. *Commonwealth v. Trigones,* 393 Mass. 633 (1986). Further, the subject of the request for a blood sample is entitled to a hearing on the issue. *In the Matter of Lavigne,* 418 Mass. 831, 835 (1994). At the hearing on this matter, the Commonwealth did not argue that there is probable cause to believe that (L.R. or A.R.) committed the rape of (the Victim). Indeed a review of the allegations contained in the Commonwealth's petition indicates that the Commonwealth has failed to establish that there is probable cause that either (L.R. or A.R.) committed the offense. Rather, the Commonwealth is seeking "mere evidence" of a crime and justifies its request on the particular facts of this case, and the concept that the Grand Jury ought to be provided with

evidence which it seeks in furtherance of an investigation, so long as that request is reasonable. An analysis of *Lavigne*, however, does not seem to confer such rights to the Grand Jury. Although the issue in *Lavigne* involved the necessary requirements for the issuance of a search warrant for the taking of blood samples, the analysis of the competing rights is the same. In *Lavigne*, the Supreme Judicial Court held that in order for a Court-authorized search warrant to issue, " . . . there must exist probable cause for believing that the person whose blood the Commonwealth seeks has committed the crime." *Id.* at 835. No such showing has been made in this case, nor am I persuaded that the Grand Jury is entitled to the production of "mere evidence" which would not otherwise be available to the Commonwealth through normal investigative procedures or through application to the Court for a search warrant. To decide otherwise would be to allow violations of constitutionally protected rights, so long as the violations were "reasonable" and done pursuant to a Grand Jury investigation. Although the Grand Jury has broad investigatory powers, they are still subject to the recognition of each individual's rights as afforded by the Constitution.

Since this matter involves a Grand Jury proceeding, the public's right to access to this proceeding is outweighed by the privacy rights of (L.R. and A.R.), and the recognition that Grand Jury proceedings are secret. Accordingly, this decision is impounded and is to be made available only to the parties to this petition. Counsel for (L.R. and A.R.), as well as the Commonwealth, may have copies of this decision, and counsel for (L.R.

and A.R.) may show this decision to their clients. Otherwise, there is to be no dissemination of this decision.

/s/ Judd J. Carhart
Judd J. Carhart
Justice of the
Superior Court

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH AT BOSTON,

April 10, 1998

IN THE CASE NO. SJC-07477

IN THE MATTER OF A GRAND JURY INVESTIGATION pending in the Supreme Judicial Court for the County of Suffolk No. SJ-97-222

ORDERED, that the following entry be made in the docket; viz., –

The case is remanded to the single justice with instructions that an order shall be issued in the Superior Court directing the father and the brother each to submit to the taking of a blood sample by trained laboratory personnel under the supervision of the State police.

BY THE COURT,

/s/ Jean M. Kennett, CLERK.

April 10, 1998
SEE OPINION ON FILE.

SJC-07477

IN THE MATTER OF A GRAND JURY INVESTIGATION.

Suffolk. January 9, 1998. – April 10, 1998.

Present: Wilkins, C.J., Abrams, Lynch, Greaney, Fried, Marshall, & Ireland, JJ.

Grand Jury. Probable Cause. Constitutional Law, Search and seizure. *Search and Seizure,* Blood sample, Probable cause. *Evidence,* Blood sample. *Due Process of Law,* Seizure of blood sample.

Civil Action commenced in the Supreme Judicial Court for the county of Suffolk on April 17, 1997.

The case was heard by *O'Connor,* J.

David F. Capeless, Assistant District Attorney, for the Commonwealth.

Robert J. Carnes for the brother.

Paul W. Cormier for the father.

Scott Harshbarger, Attorney General, *& Pamela L. Hunt,* Assistant Attorney General, for the Attorney General, amicus curiae, submitted a brief.

WILKINS, C.J. A grand jury in Berkshire County is investigating the apparent rape of a twenty-one year old woman who is profoundly retarded and autistic. The woman, who lives with her parents and brother, cannot talk and requires twenty-four hour supervision. In the fall of 1996, a physician determined that the woman was

pregnant.[1] The woman is incapable of identifying the man who caused her pregnancy. Police investigation led to the reasonable belief that either the woman's father or her brother caused her pregnancy. A State trooper sought to obtain blood samples from each for comparison testing, but, on advice of counsel, each declined to cooperate.

In February, 1997, the State trooper testified before the grand jury, presenting the information that we have just summarized. The district attorney then petitioned, on behalf of the grand jury, for a court order directing the father and the brother each to submit to the taking of a sample of blood by trained laboratory personnel under the direction of the State police. The father and the brother, represented by separate counsel, opposed the petition. They relied on the prohibition of unreasonable searches and seizures stated in both the Federal and State Constitutions but on appeal make no claim that the two provisions call for different results. See *Commonwealth v. Downey*, 407 Mass. 472, 475 n.5 (1990).

A judge in the Superior Court held a hearing on the petition and denied it. Relying on this court's opinion in *Matter of Lavigne*, 418 Mass. 831 (1994), which concerned the right of the police to take a blood sample pursuant to a search warrant, the judge concluded that the Commonwealth must show that there is probable cause for believing that the person whose blood is sought committed the

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[1] Pursuant to court order, the pregnancy was terminated on December 17, and fetal tissue was preserved that would permit genetic testing.

crime under investigation. Because, in his view, the Commonwealth failed to make such a showing, the judge declined to order the production of blood samples.

The Commonwealth next petitioned a single justice of this court, under G. L. c. 211, § 3, for relief from the order entered in the Superior Court. After a hearing, a single justice of this court denied relief without filing a memorandum of decision or otherwise stating why he did so.[2] The Commonwealth has appealed from the judgment denying relief. The only issue before us is whether the single justice erred in ruling that the Superior Court judge was correct in denying the Commonwealth's petition for orders to produce blood samples. Neither the father nor the brother argues that the single justice might have decided the case on any other ground or that we should do so.

In *Schmerber v. California*, 384 U.S. 757, 769-771 (1966), the Court balanced the State's interest in obtaining evidence against the defendant's rights. It held that a defendant's constitutional right not to be subjected to unreasonable searches and seizures was not violated when, in exigent circumstances and with probable cause to believe that the defendant had operated a motor vehicle while intoxicated, a doctor on direction of a police officer drew blood from the defendant shortly after a motor vehicle accident. "Such tests are a commonplace in

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[2] The single justice had dissented in part in *Matter of Lavigne*, 418 Mass. 831, 839-840 (1994) (O'Connor, J., dissenting).

these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain" (footnote omitted). *Id.* at 771. The Court emphasized that there was a clear indication that relevant evidence would be found because a blood test is an effective means of determining whether a person is intoxicated. *Id.* The absence of an adequate alternative means of proof bears on the intensity of the State's interest in obtaining the evidence and is a factor to be considered in the balancing test stated in the *Schmerber* opinion. See *Winston v. Lee*, 470 U.S. 753, 762-763 (1985). A more substantial bodily intrusion might require a different result, even if there were probable cause to believe that a defendant had committed a crime and the intrusion would produce relevant evidence, especially if the State's need for the evidence was not great. *Id.* at 766 (unreasonable search to compel defendant to submit to potentially dangerous surgery to remove bullet from defendant's chest for which State had not shown compelling need). Although the *Schmerber* and *Winston* opinions indicate that drawing blood is not by itself unreasonable, they tell us little about the standard to be applied when a request comes from a grand jury.

In certain circumstances, the police may seek blood samples, either before or after criminal charges have been brought, without violating any constitutional prohibition. See *Matter of Lavigne*, 418 Mass. 831, 835 (1994) (taking of blood of suspect, pursuant to preindictment search warrant, would not be unconstitutional search or seizure provided that there was probable cause to believe suspect

committed a crime and his blood would aid in investigation of that crime); *Commonwealth v. Trigones*, 397 Mass. 633, 640 (1986) (postindictment, hence after finding of probable cause, order that defendant provide blood sample may properly issue on showing "that a sample of the defendant's blood will probably produce evidence relevant to the question of the defendant's guilt"). The issue of significance in this case is what level of probability the Commonwealth must establish that the person from whom blood is sought committed the crime under grand jury investigation. Other considerations point to the allowance of the grand jury's request. The degree of bodily intrusion would be minimal. The evidence would be highly relevant on the issue of the father's and the brother's guilt or innocence. And there is no better source of evidence of such strength available to the grand jury.[3]

Our analysis of the claim of a constitutional violation is advanced only a little by stating that the Commonwealth must demonstrate probable cause. The more useful inquiry asks of what must there be probable cause? In other areas requiring probable cause determinations, the answer varies depending on the circumstances. There is probable cause to arrest a suspect if "at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed . . . an offense" (*Commonwealth v. Sanna*, 424 Mass. 92, 99 n.11 [1997], quoting *Commonwealth v. Santaliz*, 413

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[3] The record does not show what tests are contemplated or, if DNA testing is planned, whether blood is a better source for testing than, for instance, hair or saliva.

Mass. 238, 241 [1992]), or, to put it another way, probable cause to arrest "requires more than mere suspicion but something less than evidence sufficient to warrant a conviction." *Commonwealth v. Roman*, 414 Mass. 642, 643 (1993), quoting *Commonwealth v. Hason*, 387 Mass. 169, 174 (1982). There is probable cause to indict a suspect if there is "sufficient evidence to establish the identity of the accused, and probable cause to arrest him or her." *Commonwealth v. Caracciola*, 409 Mass. 648, 650 (1991). See *Commonwealth v. Fourteen Thousand Two Hundred Dollars*, 421 Mass. 1, 9 (1995). The term imports a higher standard when a District Court judge at a probable cause hearing decides whether a criminal defendant should be held for trial. *Id.* at 8. Probable cause to hold a defendant for trial requires the Commonwealth to present evidence sufficient to warrant a conviction (the "directed verdict" rule). See *Commonwealth v. Fourteen Thousand Two Hundred Dollars, supra* at 8; *Myers v. Commonwealth*, 363 Mass. 843, 850 (1973).

Constitutional standards for the reasonableness of a search or seizure based on a warrant require that there be "a fair probability that contraband or evidence of a crime will be found in a particular place" (*Illinois v. Gates*, 462 U.S. 213, 238 [1983]), or that the issuing magistrate have "a substantial basis for concluding that any of the articles described in the warrant are probably in the place to be searched" (*Commonwealth v. Upton*, 394 Mass. 363, 370 [1985]). See *Commonwealth v. Neilson*, 423 Mass. 75, 77 n.3 (1996). This probability standard does not mean that it must appear more likely than not that the items are in a particular place to be searched. See *Illinois v. Gates, supra* at 235. And there is no requirement at all that the person

to whom a search warrant is directed should himself even be suspected of crime, much less that there be probable cause to believe him guilty.

As long as we define a standard for the production of blood samples that meets the requirement of reasonableness of the Fourth Amendment to the United States Constitution and of art. 14 of the Massachusetts Declaration of Rights, the label of probable cause need not be used. A standard that requires that a grand jury request must be reasonable in light of the facts seems appropriate. Given that a grand jury must find probable cause to indict, it would be peculiar to require them to demonstrate the same degree of probable cause to believe that a target of their investigation committed a crime before the grand jury could properly obtain evidence in aid of their investigation. See *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) ("A grand jury subpoena is thus much different from a subpoena issued in the context of a prospective criminal trial. . . . [T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists"); *Id.* at 306 (Stevens, J., concurring); *Henry v. Ryan*, 775 F.Supp. 247, 255 (N.D. Ill. 1991). But see *Wollverton v. Multi-County Grand Jury Okla. County*, 859 P.2d 1112, 1115 (Okla. Crim. App. 1993). It would obviously frustrate this grand jury's inquiry to require them to demonstrate that it is more probable than not that one or the other of the men from whom blood is sought committed the crime. We think that the constitutional requirement that searches

and seizures be reasonable does not compel the application of such a high standard when a grand jury are involved.

The grand jury uniquely "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. . . . [T]he identify of the offender, and the precise nature of the offense . . . normally are developed at the conclusion of the grand jury's labors, not at the beginning." *United States v. Dionisio,* 410 U.S. 1, 13 n.12 (1973), and cases cited. The Court has noted that "[t]he grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. . . . The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *United States v. R. Enters., Inc., supra* at 297. A grand jury's investigative power is necessarily broad. See *United States v. Calandra,* 414 U.S. 338, 344 (1974); *United States v. Dionisio, supra* at 15. It is, however, not unlimited.

A grand jury must have a reasonable basis for believing (have probable cause for believing, if you wish) that a blood sample will provide test results that will significantly aid (in this case perhaps indispensably aid) the grand jury in their investigation of circumstances in which there is good reason to believe a crime was committed. Cf. *Commonwealth v. Doe,* 408 Mass. 764, 769 (1990)

(order to appear at police lineup supported by reasonable suspicion that person committed crime under grand jury investigation). In this case, an additional demonstration supports the issuance of orders for blood samples. There is reason to believe (it may even be more likely than not) that either the father or the brother caused the pregnancy. Proper testing certainly will exclude one, and could exclude both, from the grand jury's continuing interest. The test results, no matter what they are, will be a significant aid in the grand jury's inquiry. The reasonable expectation is that the test results will strongly point to, but not conclusively prove, the guilt of the man who caused the pregnancy. See *Commonwealth v. Beausoleil*, 397 Mass. 206, 217-218 (1986).[4]

The case is remanded to the single justice with instructions that an order shall be issued in the Superior Court directing the father and the brother each to submit to the taking of a blood sample by trained laboratory personnel under the supervision of the State police.

So ordered.

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[4] There is no reason to require that the issue in this case be presented by an application for, and enforcement of, a search warrant. The issue of obtaining blood samples for a grand jury can properly be raised as was done in this case. Such a process provides greater protection to an individual's interests than would the issuance of a search warrant in an ex parte proceeding before a judge. *Commonwealth v. Trigones*, 397 Mass. 633, 641 (1986). Thus, we disagree with the contrary view expressed in *In re Grand Jury Proceedings (T.S.)*, 816 F. Supp. 1196, 1205 (W.D. Ky. 1993).

* * * IMPOUNDED * * *

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SJC-07477

IN RE: GRAND JURY INVESTIGATION

ENTRY DATE 05/28/97
STATUS DATE 04/10/98
ROUTE TO SJC DESJA
AC/SJ DKT NO SJ-97-0222
APPELLANT P
BRIEF STATUS
ARGUED DATE 01/09/98
DECISION DATE 04/10/98
LEAD CASE
TRIAL JUDGE O'Connor F.P.
TC ENTRY DATE 04/17/97
CASE STATUS Decided (Full Opinion)
NATURE 211.3
ROUTE DATE 05/13/97
DAR/FAR NO
FAR APPLICANT
BRIEF DUE
QUORUM W+ A LY G F M I
CITATION 427 Mass. 221
RELATION
TRIAL CT SJC for Suffolk County
TC DOCKET NO SJ-97-0222
CV/CR CV
CLERK JB
RSCRPT 05/08/98
PUBLIC n

Additional Information
Add'l trial court info: Carhart J.J.
Per Chief Justice Wilkins: Rescript not to be released until further order of the court.

Commonwealth
Petitioner/Appellant
Blue brief filed
15 Main Br., 15 App.
2 Extensions, 30 Days
Active 04/17/97

Anne M. Kendall, A.D.A.
Office of the
District Attorney
Berkshire District
7 North Street,
P.O. Box 1969
Pittsfield MA 01202-1969
Phone: 413-443-5951
543934 Inactive 11/10/97

David F. Capeless, A.D.A.
Office of the
District Attorney
42 West Street
P.O. Box 1969
Pittsfield MA 01202
Phone: 413-443-5951
Fax: 413-499-6349
072570 Active
04/22/97 Notify

Gerard D. Downing,
A.D.A.
Office of the
District Attorney
Berkshire District
7 North St., P.O. Box 1969
Pittsfield MA 01202-1969
Phone: 413-443-5951
Fax: 413-499-6349
133220 Active
05/13/97 Notify

Brother of Victim (ar)
Respondent/Appellee
Red brief filed
15 Main Br.
Active 04/17/97

Father of Victim (lr)
Respondent/Appellee
Red brief filed
15 Main Br.
2 Extensions, 36 Days
Active 04/17/97

Supreme Judicial Court
for Suffo
(Lower Court: civil
or general)
Office of the Clerk
1404 New Courthouse
Boston MA 02108
Phone: 617-557-1100
Active 04/17/97 Notify

Attorney General
Amicus
Scott Harshbarger
Amicus brief filed
15 Main Br.
1 Extensions, 98 Days
Active 07/22/97

Robert J. Carnes, Esquire
57 Wendell Avenue
Pittsfield MA 01201
Phone: 413-443-1010
Fax: 413-445-5895
074640 Active
04/22/97 Notify

Paul W. Cormier, Esquire
8 Bank Row
Pittsfield MA 01201
Phone: 413-499-5822
100120 Active
04/22/97 Notify

Pamela L. Hunt, Esquire
Office of the
Attorney General
One Ashburton Place
Appeals Division
- Room 1811
Boston MA 02108
Phone: 617-727-2200 2826
Fax: 617-727-5755
244520 Active
07/22/97 Notify

PAPER	DATE	ENTRY
1.0	05/28/97	Entered, Notice to counsel.
2.0	05/28/97	MOTION to dismiss appeal, filed for Father of Victim (lr) by Paul W. Cormier, Esquire. NOTE: Motion originally filed in SJ-97-222.
3.0	05/28/97	MOTION to dismiss appeal, filed for Brother of Victim (ar) by Robert J. Carnes, Esquire. NOTE: Motion originally filed in SJ-97-222.
4.0	05/28/97	ORDER OF REFERENCE of Paper #2 & 3 (Motions to dismiss Commonwealth's Appeal (2 motions, father, brother) to single justice for recommendation. (By the Court) jmk
5.0	06/25/97	ORDER: On the recommendation of a single justice of this court, it is ORDERED that the Commonwealth's appeal is allowed and the respondent's motions to dismiss are denied. By the Court.
6.0	07/02/97	MOTION to extend to 07/22/97 filing of brief of Petitioner/Appellant Commonwealth by Anne M. Kendall, A.D.A., David F. Capeless, A.D.A., Gerard D. Downing, A.D.A. ALLOWED. Notice to counsel.
7.0	07/17/97	MOTION to extend to 08/06/97 filing of brief of Petitioner/Appellant Commonwealth by Anne M. Kendall, A.D.A., David F. Capeless, A.D.A., Gerard D.

Downing, A.D.A. ALLOWED. Notice to counsel.

8.0 07/22/97 MOTION to be "given access to impounded materials in the above referenced case.", filed for Attorney General by Pamela L. Hunt, Esquire.

9.0 07/22/97 ORDER OF REFERENCE of Paper #8 (Motion for access to impounded material) to single justice for disposition. (By the Court). jmk.

10.0 08/07/97 SERVICE of brief for Petitioner/Appellant Commonwealth by Anne M. Kendall, A.D.A., David F. Capeless, A.D.A., Gerard D. Downing, A.D.A.

11.0 08/15/97 ORDER: Paper #9 (Motion for Access to to Impounded Materials filed by the Attorney General) ALLOWED, O'Connor, J. Notice to counsel by S.J. Clerk.

12.0 09/05/97 SERVICE of brief for Respondent/Appellee Brother of Victim (ar) by Robert J. Carnes, Esquire.

13.0 09/09/97 MOTION to extend to 09/26/97 filing of brief of Respondent/Appellee Father of Victim (lr) by Paul W. Cormier, Esquire. ALLOWED. Notice to counsel.

14.0 10/14/97 MOTION to extend to 10/14/97 filing of brief of Respondent/Appellee Father of Victim (lr) by Paul W. Cormier, Esquire. ALLOWED. Notice to counsel. lhw.

15.0 10/14/97 SERVICE of brief for Respondent/Appellee Father of Victim (lr) by Paul W. Cormier, Esquire.

16.0 11/04/97 NOTICE of January argument sent.

17.0 12/04/97 ORDERED for argument on January 9. Notice sent.

01/09/98 Oral argument held. (W A LY G F M I).

18.0 01/21/98 MOTION to extend to 01/20/98 filing of brief of Amicus Attorney General by Pamela L. Hunt, Esquire. ALLOWED. Notice to counsel. sm

19.0 01/20/98 SERVICE of brief for Amicus Attorney General by Pamela L. Hunt, Esquire.

20.0 04/10/98 RESCRIPT (Full Opinion): The case is remanded to the single justice with instructions that an order shall be issued in the Superior Court directing the father and the brother each to submit to the taking of a blood sample by trained laboratory personnel under the supervision of the State Police. (By the Court). Notice to counsel. Reasons as on file.

21.0 04/21/98 MOTION for Early Release of the Rescript Opinion, filed for the Commonwealth by David F. Capeless, A.D.A.

22.0 04/21/98 OPPOSITION to Paper #21, filed by Brother of Victim (ar) filed by Robert J. Carnes, Esquire. u/a

23.0 04/21/98 OPPOSITION to Paper #21, filed by Father of Victim (lr) filed by Paul Paul [sic] W. Cormier, Esquire.

24.0 04/22/98 ORDER: Paper #21 (Motion for Early Release of the Rescript Opinion) DENIED By the Court. Notice to counsel. jmk.

25.0 05/07/98 MOTION for Stay of Issuance of Rescript. May 12, 1998. ALLOWED until

	further order of the Court. Notice to counsel.
26.0 05/08/98	MOTION of respondent A.R. for stay of issuance of rescript for 60 days.